

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22134

563

THOMAS W. MOON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 7 1968

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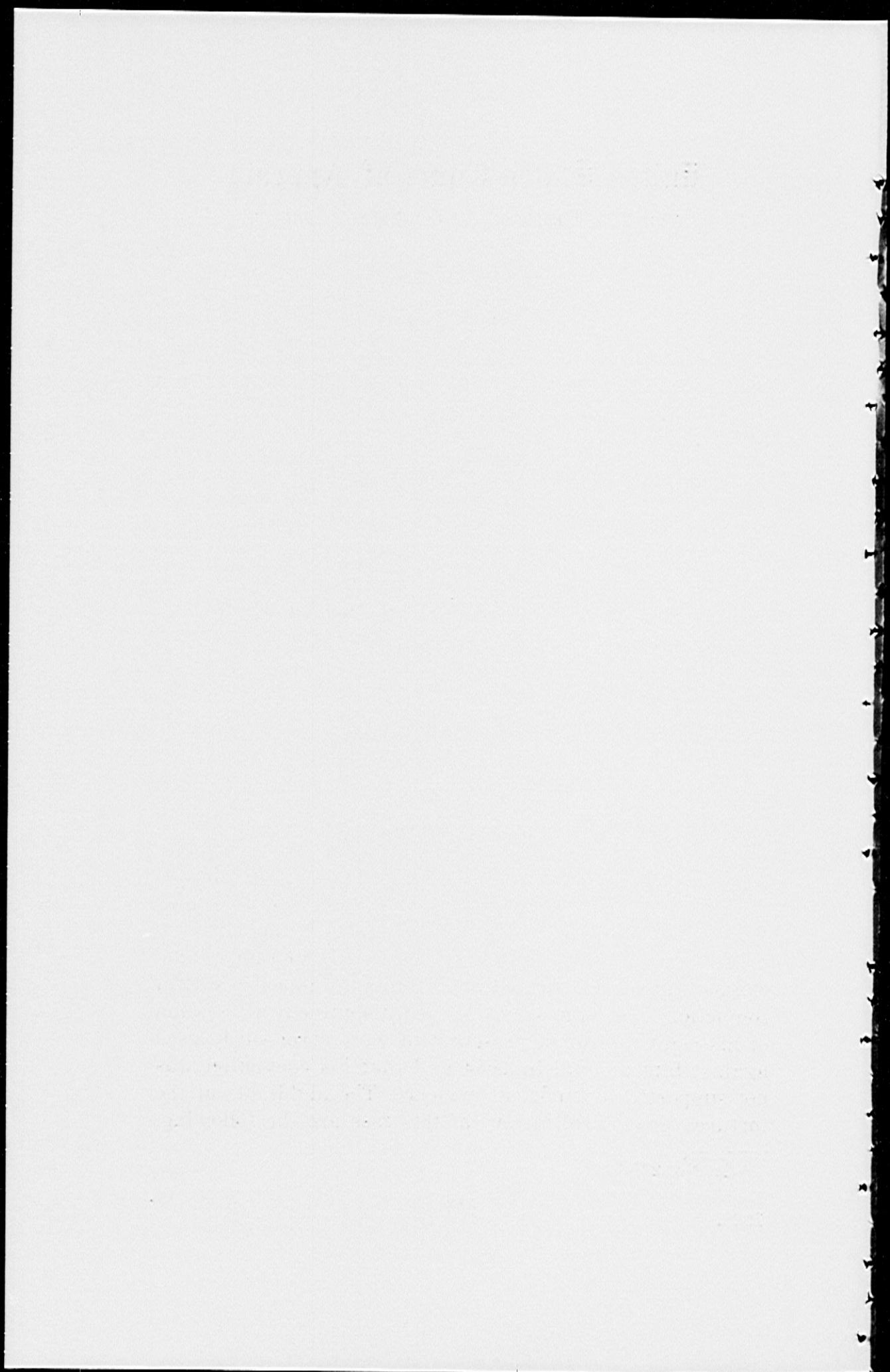
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ISSUE PRESENTED *

Is appellant entitled to a new direct appeal on his 14 year old conviction, where he presented to this Court claims for appeal 14 years ago, had them denied inferably as frivolous and failed to appeal from that denial, and where in presenting his claims to this Court, he was represented by counsel, who had access to persons knowledgeable of the events in appellant's trial and who filed a memorandum and argued orally in support of appellant's claims?

* This case has been before this Court previously on many occasions, most recently in Misc. No. 2042, decided October 24, 1963.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,134

THOMAS W. MOON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This appeal is from a denial by Judge William Bryant of appellant's motion to vacate sentence under 28 U.S.C. § 2255, the latest in a long line of efforts by appellant to overturn his 1954 robbery conviction.¹ His current motion claims that he was denied opportunity to appeal his 1954 conviction, that admissions allegedly obtained in violation of his right to prompt presentment were erroneously used against him at trial in 1954 and that his conviction was not supported by sufficient evidence. The highlights of the tortured procedural history of this case are the following.

¹ Cr. No. 228-54.

Appellant, along with three co-defendants, was tried for robbery before jury and Judge James W. Morris in October 1954. The jury found appellant guilty and Judge Morris sentenced him to four to twelve years imprisonment. Service of his sentence was to commence at the expiration of a three to nine year sentence on a prior conviction. Appellant requested leave to appeal in forma pauperis from Judge Morris, who after reviewing the trial proceedings and finding no errors justifying the authorization of an appeal, denied the request. Appellant then *pro se* sought leave to appeal in forma pauperis from this Court,² alleging a number of errors including insufficiency of evidence. The Government filed an opposition to the petition, pointing out the frivolousness of each one of the contentions raised. Appellant, represented by counsel who had talked to all of the defendants and two of the trial attorneys and who did not request a transcript as an aid to supporting the petition, then filed a memorandum in answer to the Government's opposition, elaborating on his claim of insufficiency of the evidence. Oral argument was heard on the petition and this Court (per Circuit Judges Edgerton, Prettyman and Fahy) denied it. Appellant did not seek review of that denial, either by petition for reconsideration in this Court or by petition for certiorari in the Supreme Court. Appellant's conviction became final in 1955.

Since 1955, appellant with assistance of counsel has instituted a battery of collateral attacks³ on his conviction, and time and again has received conscientious consideration of his claims by both the District Court and this Court. None of these attacks has been deemed meritorious. Of special significance to the disposition of the current appeal is Misc. 2042, in which appellant argued to this Court both the erroneous use of admissions and insufficiency of the evidence, with the benefit of the transcript of the Government's evidence. Counsel also suggested that

² Misc. No. 513.

³ Including Misc. Nos. 804, 15 148, 1657, 1795, 2042.

if the then current law governing in forma pauperis access to the Court of Appeals⁴ were applicable to appellant's 1954 case, he would have been allowed a direct appeal.⁵ This Court denied appellant's claim for relief. His petition for reconsideration was also denied (per Chief Judge Bazelon and Judges Prettyman and Burger).

ARGUMENT

Appellant's claims do not entitle him to relief.

The claim raised by appellant relating to use of admissions against him and insufficiency of evidence, are not cognizable on collateral attack.⁶ These claims have already been argued to this Court, with reference to pertinent portions of the trial transcript, and were properly denied.⁷ Appellant's claim regarding defective access to this Court for direct appeal purposes is also not cognizable on collateral attack.⁸

Appellant's additional claim that he was denied a direct appeal because of his poverty and accordingly should now be granted a new direct appeal is without merit. Appellant was in no sense denied an appeal outright due to his poverty.⁹ His petition for leave to appeal was properly processed in accordance with the practices prevailing in

⁴ *Coppedge v. United States*, 369 U.S. 438 (1962).

⁵ Misc. No. 2042, Petitioner's Memorandum, filed May 31, 1962, p. 11.

⁶ *Edwards v. United States*, 103 U.S. App. D.C. 152, 256 F.2d 707, cert. denied, 358 U.S. 847 (1958); *Upshaw v. United States*, 102 U.S. App. D.C. 299, 252 F.2d 863, cert. denied, 357 U.S. 939 (1958).

⁷ Misc. No. 2042.

⁸ *Hodges v. United States*, 108 U.S. App. D.C. 375, 282 F.2d 858 (1960), cert. dismissed, 318 U.S. 139 (1961).

⁹ This is not a case where appellant's poverty prevented him from purchasing materials prerequisite to the appellate court's considering whether his claims had any merit. Compare *Griffin v. Illinois*, 351 U.S. 12 (1956).

1955.¹⁰ The trial judge found no errors meriting an appeal. Appellant had the assistance of counsel in presenting his claims for appeal to this Court. Counsel had access to the persons having direct knowledge of the events in appellant's trial. Counsel filed a memorandum in support of appellant's claims. The Government filed a memorandum pointing out their frivolousness, and oral argument was held.

Appellant's contention apparently goes further, that even if he was not denied access to appeal outright, the practices governing leave to appeal in 1955 were too restrictive in terms of the standard for measuring meritorious claims and the availability of transcript to support claims, and that a 1968 study of the trial transcript discloses possible errors which are alleged to be nonfrivolous and should have been deemed the predicate for appeal in 1955. The contention is very answerable. There is nothing in the record to indicate that the Court applied an improper standard in measuring appellant's claims. The Government argued they were frivolous and the only fair inference from the Court's denial is that it agreed they were frivolous.¹¹ If the Court incorrectly applied the proper standard, or for that matter applied an improper standard, there was remedy available at that time, review by this Court through reconsideration or by the Supreme Court through certiorari.¹² That appellant and his counsel

¹⁰ See, e.g., *Surratt v. United States*, 104 U.S. App. D.C. 380, 262 F.2d 691 (1958), *cert. denied*, 371 U.S. 880 (1962).

¹¹ This is not a case where the Government argued an improper standard, by arguing that appellant raised no *substantial* rather than *nonfrivolous* claims, and where this Court inferably applied an improper standard in denying leave to appeal. Compare *Coppedge v. United States*, *supra* note 4 at 451. Indeed the general Court of Appeals standard at the time of appellant's appeal was apparently that of frivolousness and not insubstantiality. See *Surratt v. United States*, *supra* note 10; *Gerringer v. United States*, 93 U.S. App. D.C. 403, 409, 213 F.2d 346, 352 (1954).

¹² The Supreme Court was reviewing cases in which Courts of Appeals had applied an erroneous standard in passing on an indigent's application for leave to appeal. See *Coppedge v. United States*, *supra* note 4, at 440, n.1.

chose not to pursue the available remedy should certainly preclude review fourteen years later.¹³

The fact that appellant now raises an appeal claim not raised in 1955, the use of admissions against him, does not change the picture. Certainly the Court's denial of leave to appeal cannot be faulted because of a claim of error not brought to its attention. Appellant does not claim that ineffective assistance of counsel obtained in his original appellate counsel's not raising this issue. Absent such a showing, discovery of new alleged trial errors should not change the merits of appellant's claim to relief.

As to the claim of transcript unavailability, the only thing that is clear on the record is that appellant's counsel did not request a transcript. There is no basis on the record for concluding that counsel was precluded from obtaining a transcript. Moreover, it is clear that counsel conferred with the persons involved in the trial and the availability and use of this aid should preclude the extraordinary relief now sought.

Assuming *arguendo* that appellant could not have obtained the kind of assistance outlined in *Coppedge v. United States* for readying his case for a decision on leave to appeal, we submit that *Coppedge* should not in effect be applied retrospectively to this case. It is clear that there is nothing about a ruling such as *Coppedge* that requires its retrospective application.¹⁴ The Supreme Court decision prohibiting a denial of access to appeal much more extreme than *Coppedge* included the concurring voice of Justice Frankfurter, who suggested that retrospective application even in that case was by no means necessary.¹⁵ This Court in considering appellant's claim to relief in Misc. No. 2042 had before it his counsel's suggestion for retrospective application of *Coppedge*, and

¹³ *Sunal v. Large*, 332 U.S. 174 (1947).

¹⁴ *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 363-66 (1932); *Linkletter v. Walker*, 381 U.S. 618 (1965).

¹⁵ *Griffin v. Illinois*, *supra* note 9, at 25-26.

by denying relief, implicitly rejected the retrospectivity suggestion. That ruling can by itself be dispositive of the current claim. And public policy tied to the finality of judgments strongly militates against the resurrection of very old cases, where the underlying claims of error do not go to the integrity of the fact-finding process of the original trial and where remands or new trials pursuant to non-affirming direct review might very well be rendered impossible due to the passage of time.¹⁶

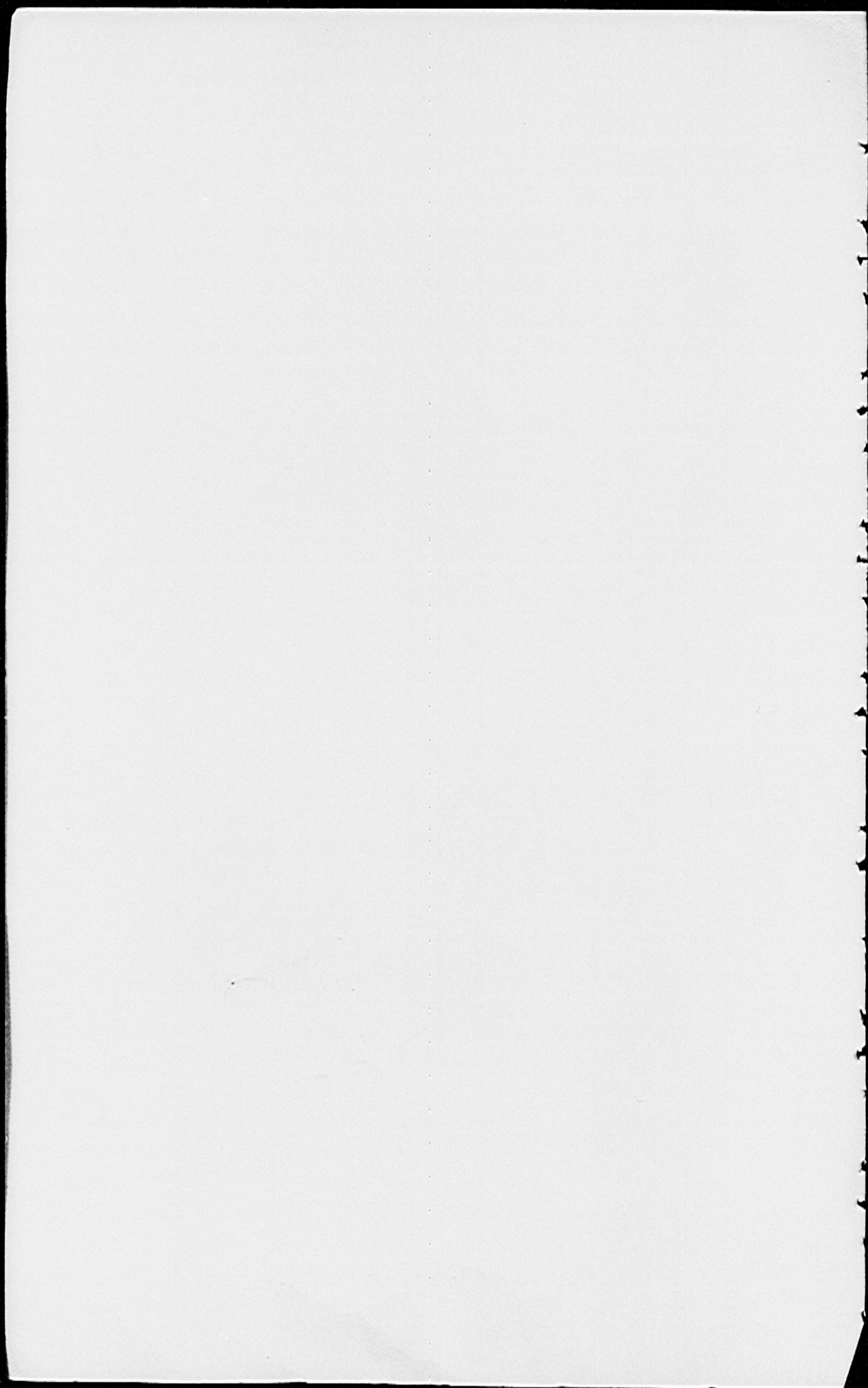
CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of the District Court should be affirmed.

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¹⁶ See *Thorton v. United States*, 125 U.S. App. D.C. 114, 119, 368 F.2d 822, 827 (1966).



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,134

THOMAS W. MOON, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM A DENIAL OF A MOTION
PURSUANT TO 28 U.S.C. §2255 IN
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 19 1968

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QUESTIONS PRESENTED

1. Whether an indigent who has never been allowed a direct appeal from his conviction was denied opportunity for an appeal equal to that of a non-indigent where the trial court required him to show substantial points on appeal before allowing the appeal, where the trial court erroneously found there were no such points, and where the Court of Appeals had an insufficient basis upon which to determine the good faith of his appeal.
2. Whether substantial errors committed at Moon's trial, including the admission of illegally obtained confessions, the lack of corroboration of his confessions, and the insufficiency of the evidence of aiding and abetting a robbery, require reversal of Moon's conviction.

Rule 3(d) Statement

This case has never been before this Court. This Appellant has been before the Court, however, in Moon v. United States, 106 U.S. App. D.C. 301, 272 F.2d 530 (1939); Misc. No. 513 (1955); Misc. No. 804 (1957); Misc. No. 1657 (1961); Misc. No. 1795 (1962); Misc. No. 2042 (1963).

STATUTES INVOLVED

United States Constitution, Fifth Amendment

"No person shall be. . .deprived of life, liberty, or property, without due process of law..."

23 U.S.C. §2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States. . .or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for relief may be made at any time. . . .

If the court finds. . .that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. . . .

The sentencing court shall not be required to entertain a record or successive motion for similar belief on behalf of the prisoner.

An Appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus. . . .

23 U.S.C. §1915. Proceedings in forma pauperis.

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes an affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to relief.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

F. R. Crim. P. 40.

(b) Arrest in Distant District.

(1) Appearance before Commissioner or Judge. If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed

in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available commissioner or a nearby judge of the United States in the district in which the arrest was made.

(2) Statement by Commissioner or Judge. The commissioner or judge shall inform the defendant of the charge against him, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a hearing or to waive a hearing by signing a waiver before the commissioner or judge. The commissioner or judge shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him, . . .

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JURISDICTIONAL STATEMENT

Appellant stands convicted with two co-defendants of robbery. 22 D.C. Code 2901. He was sentenced for this charge Criminal No. 223-54 on November 15, 1954 to four to twelve years, to be served consecutively with the sentence in another case, Criminal No. 45-54.

This appeal stems from the denial on June 19, 1968 of a motion pursuant to 28 U.S.C. §2255 to vacate the judgment in Criminal No. 228-54, and discharge the defendant from custody.

This Court has jurisdiction under 28 U.S.C. 1291 and 28 U.S.C. §2255.

STATEMENT OF FACTS

Fourteen years ago Thomas Moon was sentenced to four to twelve years in Criminal No. 228-54, this sentence to be served consecutively with a previously imposed three to nine years in another case, Criminal No. 45-54. From his sentencing on November 15, 1954 to this day, Moon* has never had an appeal from his conviction in Criminal No. 228-54. He is indigent but he has never had a full trial transcript at government expense nor has he had an appointed lawyer to appeal trial errors. These are the facts in the face of substantial legal issues implicit in a mere summary of the government's case at trial.

The Case Against Moon

Testimony at trial showed that on December 21, 1953 two armed men entered a realty company where an employee was alone except for her infant son, and stole

* Appellant will be referred to by name throughout this brief in order to avoid any possible confusion which might arise because of the many prior proceedings in which Moon was also "appellant".

approximately \$800.00 and some checks (Tr. 4-19).** Roosevelt Braddy was arrested and confessed that he had loaned his car to the men who he later learned perpetrated the robbery (Tr. 708-10). Darnell Kinnard and Roy Thomas were arrested and confessed that they had committed the robbery (Tr. 48 et. seq., 362, 377). In written statements they referred to another man who had remained in the car during the robbery, and who had received a share of the proceeds. Both statements identified this man as Thomas Moon (Tr. 702 et. seq.).

Moon, according to two police officers, admitted to them that he was with the robbers earlier in the day, waited in the car while the robbery was in progress,

** References are to the partial trial transcript in Criminal No. 228-54, docketed as a supplemental record in the instant case. This transcript was ordered prepared by this Court in Misc. 2042, see pp. 8-11 infra. It does not include the defense testimony, opening and closing statements, and the court's instructions. Record references are to the record in the instant appeal.

and received \$90 of the proceeds (Tr. 185-189, 334-337). Essentially the same admissions were testified to by the robbery victim and the wife of the owner of the realty company, who saw Moon in custody (Tr. 324, 476).

The written confessions of Kinnard and Thomas were read to the jury with "another party" substituted wherever the name of a co-defendant appeared. The defendants' testimony is not transcribed.

The government's case against Moon rested entirely on his own alleged admissions. The testimony of the arresting officers revealed the circumstances under which these were made. On February 9, 1954 the District of Columbia police learned that Moon was being held in Newark, New Jersey on a state charge (Tr. 170, 184, 185). Immediately two officers left for Newark, and saw Moon that night (Tr. 171). They informed him that they had a warrant to arrest him for robbery (Tr. 171, 185). Moon denied any connection with the crime and refused to return to Washington voluntarily. A few minutes later, however, he changed his mind and

agreed to return (Tr. 186).

The next morning, February 10, Moon appeared in a New Jersey State court (Tr. 171-2, 186, 386, 591), apparently for arraignment on the local charge (Tr. 49, 171). On the subject of these New Jersey proceedings, one officer testified that

"the police in Newark could not turn him over to us at that time. We had to wait until the following morning when he appeared in Court where, a charge, I assume it was in open court, the judge asked him if he wanted to return to the District of Columbia and told him he was entitled to a hearing there, that he didn't have to return until he had a hearing and he said he wanted to return to the District of Columbia and the judge ordered he then be turned over to us."
(Tr. 53)

Nothing in the record indicates that the New Jersey judge warned Moon of his fifth amendment right to remain silent or told him that anything he said could be used against him. Moon was not advised at this Court appearance of his right to counsel.

After the New Jersey court released Moon, District of Columbia police officers took him for a four hour train ride to Washington (Tr. 172). The police

testified that they questioned Moon continually on this trip (Tr. 173, 174, Tr. 195). After an hour of questioning, (Tr. 174) Moon, according to the police, "told us that -- well, he said that he should not be charged with this offense because he did not receive the full share of the money" (Tr. 173). Moon repeated this "defense" to the officers several times (Tr. 175, 177, 187, 188, 189).

Nowhere in their direct testimony did the officers suggest that they warned the defendant of his Fifth Amendment rights. On cross-examination, one officer admitted that in fact he did not tell the defendant that whatever he said would be used against him (Tr. 655).

Upon arrival in Washington, D.C., the officers took Moon directly to the scene of the robbery where he was viewed by the robbery victim and the wife of the realty office owner, (Tr. 175-176) and repeated his admissions to them (Tr. 177, 324, 476). Then Moon was taken to the robbery squad, booked, and asked if he wanted to make a written statement (Tr. 173). The next morning

he was taken before a magistrate, where presumably he was advised of his rights (Tr. 192).

The Instant Effort To Gain A Direct Appeal

Moon's past endless attempts to gain a direct appeal have now culminated in this proceeding which opened on February 7, 1967, with a pro se motion in the District Court entitled "Motion to Vacate Judgment and Grant New Trial". Judge Bryant granted leave to proceed in forma pauperis and appointed counsel. Counsel filed an amended pleading on May 22, 1967, and the motion was denied by opinion and order on June 29, 1968. (R. 7). Appeal in forma pauperis was allowed on July 10, 1968. (R. 9).

The central issue in the pleadings below was the same as raised herein. On this issue, Judge Bryant noted:

"Petitioner urges that his right to appeal has been effectively thwarted because of his poverty, and painstakingly develops this contention--and persuasively--except for one development in this long history of litigation." (R. 7).

"

C

The "one development" was a petition in the Court of Appeals in October 1963. (Misc. No. 2042). Judge Bryant's opinion holds that in disposing of Miscellaneous 2042, this Court was "squarely presented" with the "Coppedge issue"*** and decided either that no non-frivolous issues were involved in Moon's case or that Coppedge was not to be applied retroactively (opinion, R. 7).

Miscellaneous 2042 was an attempted appeal from the denial of a motion pursuant to 28 U.S.C. 2255, which was filed in District Court on May 26, 1962 and denied without a hearing on June 29, 1962. Without the assistance of counsel, Moon asked leave to appeal from the denial. This Court responded with an order: "that petitioner be allowed to prosecute an appeal without prepayment of costs, to the extent of having a portion of the reporter's transcript [of the government's case] prepared at the expense of the United States"; that counsel be appointed to submit a

*** Coppedge v. United States, 369 U.S. 438 (1962). Referred to hereinafter as Coppedge.

memorandum; that "Counsel for petitioner is requested to address himself to the jurisdictional issue, Fed. R. Civ. P. 73 (a), as well as to whether or not a non-frivolous question is presented".

Counsel's memorandum in Miscellaneous 2042 was entitled "Memorandum in Support of Petition for Leave To Appeal In Forma Pauperis", and had three sections:

"Petitioner's Appeal Must Be Allowed Under the Holding in Coppedge v. United States" (2 pages);

"This Court Has Jurisdiction Under Rule 73 (a) to Hear This Appeal" (2 pages);

"Petitioner's Arrest, Subsequent Alleged Admissions, and the General Conduct of His Trial, Raise Serious Questions That His Constitutional Rights Were Violated" (5 1/2 pages).

Throughout, the memorandum appears to argue only for leave to appeal the denial of the 28 U.S.C. 2255 motion and to cite Coppedge for the generality that indigent appeals should be freely allowed. Under the second heading the memorandum argues, for instance, that the appeal is timely sought because governed by the civil rules allowing 60 days to appeal if the

government is a party to the action. The memorandum never states that Moon was denied a direct appeal from his conviction because of his poverty, nor does it ask that he be granted such an appeal.

The government's Opposition to the Petition for Leave to Appeal stated simply that the errors alleged in counsel's memorandum were not cognizable under 28 U.S.C. 2255. This Court then entered a further Order (June 21, 1963) requesting a brief on: whether one appeal was timely sought (particularly Moon's claim that he had sent a timely letter which, however, did not appear in the District Court files); the issue of police perjury at trial. Police perjury is, of course, an issue which is cognizable under 28 U.S.C. 2255. Counsel's response was a memorandum devoting two pages to stating that if the defendant told the truth at trial, the police must have lied. On October 24, 1963, the petition for leave to appeal from the denial of the 28 U.S.C. 2255 motion, was itself denied.

Moon's Previous Efforts To Attain A Direct Appeal

Attempts by Thomas Moon to raise before this Court errors at his trial fill hundreds of pages, mostly with pro se letters and pleadings written from Atlanta, Alcatraz, Lorton, and Lewisburg, the various institutions where appellant has been confined through the years. Only the most significant of these attempts will be detailed.

Within ten days of sentencing, Moon pro se wrote to the trial court seeking leave to appeal in forma pauperis. The trial judge found "no substantial question of law which would justify one in authorizing an appeal in forma pauperis (December 8, 1954). Moon then wrote, again pro se, to the Court of Appeals. (Letter of January 28, 1955, Misc. No. 513). On February 3, 1955, an attorney Jeanne Miles, entered an appearance for appellant. This Court issued an Order directing that she file a memoranda clarifying the issues for a possible appeal. She was not the attorney at trial and had no transcript. Her total representations as to trial errors were in the form of a carbon copy

of the letter she had sent the trial judge, as follows:

Dear Judge Morris:

On November 1964, Thomas Moon requested that he be allowed to take an appeal from the judgment of conviction imposed by a jury on October 22, 1954. On November 19, this defendant was sentenced to serve 4 to 9 years. At the time this letter was sent, Mr. Moon was not represented by counsel, a situation arising due to his lack of funds with which to employ counsel.

This motion was denied, after which time Mr. Moon petitioned the Court of Appeals in proper person, to allow him to so proceed. The latter petition is opposed because of your failure to certify that this appeal was taken in good faith.

As the record will show, I was not counsel in the lower Court, but after talking to all of the defendants, and two of the attorneys in the case, and getting as clear a picture as possible without the transcript, I felt that his conviction was so unwarranted, I would accept the case without funds.

From the information received, I have found that Mr. Moon was not at the scene of the crime, was identified by no one, was in fact, in a car parked some distance from the real estate office, was unable to drive, and

could not have under any circumstances been a lookout because of the place where he was located.

From the witnesses and lawyers I understand that these facts were all shown by the evidence given at the trial of this case and that the only probable reason for the jury's findings was that he allegedly received some of the stolen money.

Your Honor, because robbery is defined by the District Court as follows:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

The Code further states that a principal must, if not an active participant be one who advises, incite, or conniving with the actual perpetrators of the crime I am therefore requesting that the certificate allowing Mr. Moon to proceed be granted, so that the definition of a principal to the crime of robbery be made and the crime

of robbery defined. If possible, I would further appreciate a conference with you on the matter.

Very truly yours,

Jeanne B. Miles

The motion for leave to appeal in forma pauperis was denied after argument on April 11, 1955. (Misc. No. 513).

On January 14, 1957, appellant pro se moved in District Court for a trial transcript and the government exhibits. This was denied on March 11, 1957.

Frustrated in every attempt to appeal his case on its merits, Mr. Moon next wrote a long letter to the Court of Appeals requesting any relief which would simply give him the opportunity of presenting the substance of his case. The government submitted its opposition, and the Court, apparently interpreting appellant's handwritten letter as a motion for leave to appeal, denied relief on July 5, 1957. (Misc. No. 804).

On March 3, 1959, almost two years later, appellant, by counsel, filed a Motion to Vacate Judgment and Grant a New Trial Under Section 2255, Title 28 U.S.C., setting forth trial errors. The District Court denied the motion on the ground that Moon had not yet begun serving the sentence he sought to attack. (May 8, 1959). Leave to appeal this ruling was granted but the Court of Appeals agreed that Moon could not use 28 U.S.C. 2255 to attack a sentence he was not then serving. Trial errors were not considered in this Court's opinion. Moon v. United States, 106 U.S. App. D.C. 301, 272 F.2d 530 (Nov. 5, 1959).

As soon as appellant began serving the sentence in Criminal No. 228-54 he sought relief, through counsel, pursuant to 28 U.S.C. 2255. The motion cited these grounds: ineffective assistance of counsel, illegal arrest, improper questioning, and impermissible joinder of defendants for trial. The District Court denied this motion in an opinion stating that such issues were cognizable only on direct appeal (Order of January 17, 1961). Leave to appeal this

ruling was denied in the District Court (April 12, 1961) and in the Court of Appeals (August 9, 1961 Misc. No. 1657).

On November 24, 1961, Moon pro se filed a "Motion in the Nature of Coram Nobis" which was denied in the District Court on November 29, 1961. Pro se again, Moon attempted to appeal the denial of this motion and raise trial errors. (Misc. No. 1795 "Leave to Prosecute an Appeal Without Prepayment of Costs"). His motion was denied by this Court on February 27, 1962 (Misc. No. 1795).

Miscellaneous number 1795 was Moon's last major effort to appeal his conviction before the 1963 proceeding described in the preceding pages infra, pp. 8-11.

Since 1963, Moon has addressed various communications to the Court and to the District Court about errors in his trial, but until the instant proceeding, has made no further formal efforts to appeal his conviction.

SUMMARY OF THE ARGUMENT

Substantial errors were committed in the course of Moon's trial in the admission of his uncorroborated confessions, all of which had been gained in blatant disregard of Rule 40, F. R. Cr. P. Even with the illegally obtained admissions, moreover, the government's evidence was insufficient to make a case of aiding and abetting a robbery. For fourteen years, Moon has been seeking reversal of his conviction on the ground of these trial errors. He has never had a direct appeal in his case.

Had Moon been a wealthy man, his appeal would have been docketed in the Court of Appeals, briefs filed, the appeal argued and before it could be dismissed, the government would have borne the burden of proving his claims frivolous. Instead, the trial court refused him leave to appeal, saying he had no "substantial" points, and the Court of Appeals on the basis of a one and a half page memorandum by a volunteer lawyer who was not trial counsel and had no transcript,

also refused leave to appeal. Failure to provide the defendant an opportunity to pursue an appeal equivalent to the opportunity enjoyed by non-indigents deprived him of due process of law.

- I. BECAUSE MOON'S POVERTY PREVENTED HIM FROM APPEALING HIS CONVICTION, HE WAS DENIED DUE PROCESS OF LAW.
(Miscellaneous No. 513, 2042)
- A. Moon Did Not Receive Equal Treatment Before The Bar.

In a day when "For all practical purposes direct appeal from conviction at government expense can no longer be denied by the District Court or this Court except on the same basis as in paid appeals.", Pannell v. United States, 115 U.S. App. D.C. 379, 320 F.2d 698 (1963), it is hard to believe there is a case like this one in which an indigent has been trying for fourteen years, in proceedings too numerous to list or explicate, to raise errors at trial, without success.

Moon made his first pro se attempt to gain an appeal within ten days of his sentence. But the trial judge found "no substantial question of law which would justify one in authorizing an appeal in forma pauperis." (Order of December 3, 1954). Appointed trial counsel did not move on Moon's behalf for appeal in forma pauperis.

Moon then wrote to the Court of Appeals seeking an appeal in forma pauperis. (Letter of January 23, 1955, Misc. No. 513). Government opposition was filed on February 23, stating that the trial court had certified that the request was not taken in good faith, 23 U.S.C. 1915(a) and that thus the appeal could not be allowed unless the certification was itself found to be in bad faith, citing Askins v. Overholser, 33 App. D.C. 243, 170 F.2d 815 (1943) and Wells v. United States, 313 U.S. 257 (1943). The government also gave one sentence apiece to some of petitioner's pro se points.

On February 3, 1955, one Jeanne Miles entered an appearance for Moon in the Court of Appeals. The Court requested that she file a reply to the Government's Opposition, to which she responded with a carbon copy of a letter she had addressed to the trial judge. (Set out in full in the Statement of Facts, pp. 12-13, supra). This "reply" evidences the fact that since she had not been trial counsel, she knew little about the legal

issues in the case. Her outline of possible points for appeal was perfunctory, at best.

The letter from attorney Miles clearly put the Court of Appeals on notice that she was a volunteer, serving without compensation or appointment. It should also have been clear that she did not herself have, and could not provide the court with, an adequate basis for determining the non-frivolousness of appeal points.

The petition for leave to appeal in forma pauperis was denied, after a hearing on April 11, 1955, without opinion.

Apparently in 1955 the District of Columbia was a place "where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments in his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself" Douglas v. California, 372 U.S. 353, 353 (1963). Douglas held that a California procedure similar to

the 1955 proceeding by which Moon was denied a direct appeal violated equal protection. Generally, as it did in Douglas, the Supreme Court has reviewed State appellate procedures for indigents under the Fourteenth Amendment. Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, supra; Anders v. California, 336 U.S. 733 (1967).

The requirement of "equal treatment for every litigant before the Bar" in the Federal Courts has been considered a non-Constitutional level, as an interpretation of 28 U.S.C. §1915. Coppedge v. United States, 369 U.S. 438, 447 (1962). Yet the language of Coppedge itself makes apparent that the procedures established are Constitutionally based. If 28 U.S.C. §1915 had not been interpreted as it was in Coppedge, the statute itself would have been unconstitutional.

Thus, pre or post Coppedge, an indigent who does not receive treatment at least arguably analagous to the Constitutionally based Coppedge procedure, has been

denied due process of law. 1/

Doyle v. United States, 366 F.2d 394 (9th Cir. 1966) applies the due process label squarely to its finding that an indigent in that case had not had an equal opportunity to appeal his conviction. In Doyle,

1/ The Fifth Amendment does not contain an equal protection clause, but discriminatory federal action is characterized as a denial of due process of law. Bolling v. Sharpe, 347 U.S. 497 (1954). Doyle v. United States, discussed in text.

Any question as to whether the constitutionally-based Coppedge procedures should now be applied to a 1955 proceeding is answered by Griffin v. Illinois, 351 U.S. 12 which gave indigents equal access to an appeal in State courts, and did it retroactively, over the vigorous plea by Justice Frankfurter that the rule be made prospective only. The reason equal access to an appeal should be applied retroactively was recognized:

"Statistics show that a substantial portion of criminal convictions are reversed by state appellate courts. Thus, to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside." 351 U.S. at 18, 19.

the Court reviewed on a 28 U.S.C. 2255 appeal the points which could have been raised on direct appeal, after a finding that such appeal had been effectively denied because Doyle's lawyer failed to tell him of his right to seek appeal in forma pauperis.

To state the Coppedge rule is to reveal that the procedures in Moon's case did not reach even the threshold of Constitutionality.

"If, from the face, of the papers [the indigent] has filed, it is apparent that the applicant will present issues for review not clearly frivolous, the Court of Appeals should then grant leave to apply in forma pauperis, appoint counsel to represent the appellant and proceed to consideration of appeal on the merits in the same manner that it considers paid appeals. If, on the other hand, the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application the Court of Appeals must provide the would-be appellant with both the assistance of counsel and a record of sufficient completeness to enable him to attempt to make a showing that the District Court's [certificate of lack of good faith is in error] and that leave to

proceed with the appeal in forma pauperis should be allowed.
369 U.S. at 446.

Even under the law as it stood in 1955, Moon was disadvantaged. The Supreme Court in 1942 had suggested that sufficient sources should be open to the indigent to prepare his Bill of Exceptions for appeal. The Court thought such a bill should be the product of the trial counsel, the appellate counsel, and even the district court judge who "must help to amplify, correct and perfect the bill". Miller v. United States, 317 U.S. 192, 200 (1942).

On the books at the time Moon was trying to appeal was Boykin v. Huff, 73 U.S. App. D.C. 373, 121 F.2d 865 (1941) which allowed an appeal three years after conviction. The Court said in Boykin:

"When the life or the liberty of the citizen is at stake on a serious criminal charge, and appeals are given as a matter of right to those who are able to pay for them, it may be doubted (though as to this we express no opinion) whether they can be withheld from indigent persons solely on the ground of their poverty or otherwise so as to give them substantially

equal protection with more fortunate citizens." 121 F.2d at 372.

The forward-looking decisions before 1955 should have assured Moon a better chance than he had for direct appeal. But in the very hard look which the Supreme Court, and this Court, have taken at appellate procedures since 1955, "it does not appear that the Court of Appeals assured petitioner adequate means of presenting it with a fair basis for determining whether the District Court's certification of good faith was warranted" Johnson v. United States, 352 U.S. 565 (1957). Johnson held that counsel must be made available to an indigent to pursue an appeal.

Soon after Johnson, the Supreme Court held that this counsel must be more than a figure in a meaningless ritual, devised for indigents alone, but must be an active advocate, competently exploring every avenue open to the indigent, just as would be done on a paid appeal. Ellis v. United States, 356 U.S. 674 (1953). Compare Anders v. California, supra at p. 22.

Finally, in the exercise of its statutory (23 U.S.C. 1915) and supervisory powers, the Supreme Court made the provision of a full transcript a virtual right. Hardy v. United States, 375 U.S. 277, (1964). In light of Hardy, it seems ironic that Moon had no transcript at all when he sought his appeal, and even today, only a partial transcript exists.

In short, neither this Court nor Moon's counsel had available a record of sufficient completeness to analyze possible points for appeal, and Moon did not have counsel who acted to present his issues in the manner of a paid advocate. Because of his poverty, Moon has never had a direct appeal.

B. The District Court Applied An Erroneous Standard in Denying Leave to Appeal, And Applied It Erroneously.

The denial by the District Court of Moon's motion for leave to appeal is an example of the improper standard generally applied in the District of Columbia in 1955. Defendants were required to show

"substantial" points before being allowed a pauper's appeal in either the District Court or the Court of Appeals. 2/ For instance, in Ellis v. United States, 101 App. D.C. 336, 249 F.2d 473 rev'd. 356 U.S. 674 (1957), in which a motion for leave to appeal was denied by the District Court as not made "in good faith". The Court of Appeals upheld the action because, though there was a possible "area of error", it was not substantial enough to call for review. The Supreme Court reversed, directing that the good faith test incorporated in 28 U.S.C. §1915(a) "must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues raised are so frivolous that the appeal would be dismissed in the case of non-indigent litigant, Fed. Rules Crim. P. 39(a), the request of an indigent for leave to appeal in forma pauperis must be allowed".

2/ The trial court's memorandum order denying Moon's motion for leave to appeal noted in so many words that . . . "There are no substantial questions of law which would justify one in authorizing appeal in forma pauperis."

356 U.S. 674 at 675.

The certification by the trial court, under 28 U.S.C. §1915, that there were no substantial points for appeal appears, moreover, to have been incorrect. Important points for appeal were and are evident on the face of this record. See Roman Numeral II of this brief. The trial court itself had recognized a close question as to the sufficiency of the evidence at the time of Moon's motion for a judgment of acquittal. 3/

2/ ". . . . I think the worst inference is that he said he got \$90 which was not a full share of the proceeds of the thing. I am not sure that that, in and of itself, shows that he knew that was the result of the robbery at the time that he took it or that he knew it was being committed and he participated in it." (Tr. 729-30).

C. Miscellaneous No. 2042 In This Court Did Not Serve As a Direct Appeal, Nor Did This Court Pass On the Issue of Whether Moon Was Denied An Appeal Because of His Poverty.

The Court below had before it essentially the same issues as here raised. Judge Bryant's response was that these issues were "presented to and ruled upon by the Court of Appeals" in Miscellaneous 2042. (1963). It is not clear whether Judge Bryant thus held that Miscellaneous 2042 was made to serve as a direct appeal for the consideration of trial errors, or whether he meant that the denial of a direct appeal was raised as an issue and decided against petitioner. Appellant maintains that Miscellaneous 2042 cannot sustain either reading.

At inception, Miscellaneous 2042 was a pro se attempt to appeal the denial of a 28 U.S.C. 2255 motion. This Court, perhaps in observance of the fact that petitioner had never had any portion of his transcript or a real opportunity to collaterally attack the sentence he was then serving, ordered a partial transcript and appointed counsel to see whether there

were non-frivolous issues to support a collateral attack. It is clear at this point that the Court was considering only an appeal from the 23 U.S.C. 2255 motion because it directed counsel to consider "the jurisdictional issue" (i.e. whether appeal was timely sought from the denial below) pursuant to 73 (a) of the Civil Rules of Criminal Procedure. And counsel's memorandum did just this.

The Court below relies heavily, however, on the fact that the Order in Miscellaneous 2042 follows the "post-Coppedge procedure" as set out in Ingram v. United States, 114 U.S. App. D.C. 233, 315 F.2d 29. The inference which is apparently sought is that in following this procedure, this Court stood ready to consider trial errors, or was establishing some sort of semi-direct appeal for Moon. But the practice of ordering a transcript and appointing counsel is equally appropriate for direct appeals and for appeals from denials of 23 U.S.C. 2255 motions. An appeal from the denial of a 2255 motion is covered by 23 U.S.C. 1915,

just as direct appeals are. Thus, on analogy to Coppedge, a court passing on a petition to appeal a 2255 denial must provide itself some rational basis for determining whether there are non-frivolous points. ⁴/

This Court, moreover, made crystal clear what it was about in Miscellaneous 2042. The February 3 Order directed counsel for petitioner to establish non-frivolous points. Were this a Coppedge-type appeal, the burden would have been on the government to establish the frivolousness of petitioner's issues. 369 U.S. at 448. This the government could not have done by its Opposition solely on the ground that the points raised were not cognizable under 28 U.S.C. 2255. Also, after petitioner's initial memorandum was filed, the Court, without comment on the trial errors discussed by petitioner

⁴/ See Ex parte Rasier, 76 U.S. App. D.C. 214, 133 F.2d 316 (1942). See also Dillon v. United States, 307 F.2d 445 (9th Cir. 1962) (appointment of counsel in a 28 U.S.C. §2255 motion held mandatory under the 5th Amendment since a fair and meaningful hearing could not be given without counsel.) United States ex rel Wissenfeld; Wilkins, 281 F.2d 707, 715 (2d Cir. 1960).

(or, for that matter, on his citation of Coppedge), asked for a memorandum directed to the issue of police perjury. Clearly, this Court wanted final satisfaction that there were no viable 2255 issues, before denying leave to appeal. When petitioner's supplemental memorandum supplied no basis for further investigation of the police perjury issue, leave to appeal was denied in a one-line Order. When all the papers in Miscellaneous 2042 are taken together, it is certain that the proceeding was not treated as a direct appeal and trial errors were ^{not} considered.

But the Court below also seems to suggest that the issue of the deprivation of a direct appeal because of indigence was raised and decided. The opinion states:

"Certain it is that the Court [of Appeals] had the Coppedge issue squarely presented to it, and it either determined that the appeal was not warranted because there was no non-frivolous issue involved; or that the Coppedge standard was not to be applied retroactively." (R. 7).

Now it is true that a short section of petitioner's memorandum in Miscellaneous 2042 is devoted to a discussion of Coppedge. But Coppedge must have been cited as support for allowing the appeal petitioner was then seeking--from the denial of the 23 U.S.C. 2255 motion. Otherwise, the government's Opposition in the proceeding makes little sense. The Government said none of petitioner's claims were cognizable under 23 U.S.C. 2255. But if the issue of denial of an appeal because of poverty had been squarely presented, this due process claim would certainly have been cognizable. To think that the Coppedge issue was squarely presented, it is necessary to believe that this Court could have decided something as momentous as the non-retroactivity of Coppedge in a one-line Order denying the petition for leave to appeal. To think, moreover, that the Court was squarely confronted with the issue herein raised, it is necessary to believe it possible that the issue of unnecessary delay in this case was considered a frivolous point. In short, too much

disbelief must be suspended to designate Miscellaneous 2042 as a proceeding which raised and decided the same issues as those in the instant proceeding.

One thing is true, however, about Miscellaneous 2042: this Court could have noticed the issue now directly raised before it. Moon was then in the same state he is in today: serving a sentence from which, because he is indigent, he has never had a direct appeal. But it would be harsh indeed to establish a rule that an issue never briefed, answered, or specifically ruled upon is forever foreclosed by the procedures on a routine petition for leave to appeal.

D. The Proper Remedy For The
Denial of Due Process in
Moon's Case is Consideration
On This Appeal of the Trial Errors.

Moon, a victim of unconstitutional discriminations against indigents, has been denied an opportunity to raise errors which occurred at his trial. The remedy now applicable for this denial is consideration by this Court pursuant to the mandate of 28 U.S.C. §2255 of the points Moon could have raised for appeal.

The remedy is consistent with this Court's decisions in cases where the allegation on a 28 U.S.C. 2255 motion has been failure of counsel to advise a defendant of his right to appeal or failure to note an appeal. Dillane v. United States, 121 U.S. App. D.C. 354, 350 F.2d 732, (1965); Paulding v. United States, 113 U.S. App. D.C. 261, 335 F.2d 636; Carrell v. United States, 113 U.S. App. D.C. 264, 335 F.2d 636 (1964). In these cases, this Court remanded for a hearing on the circumstances of the

alleged failure to advise, and if these circumstances made out ineffective assistance of counsel, ordered that the sentences be vacated so that a timely appeal might be taken. Here, of course, there is no need for any sort of evidentiary hearing, but the remedy of vacating Moon's sentence and deciding his points on appeal is applicable.

Recent cases from the Fifth and Ninth Circuits support this remedy. In Lyles v. United States, 346 F.2d 739 (5th Cir. 1965), petitioner raised the frustration of his right to appeal claiming that his court-appointed lawyer had told him an appeal would cost \$500 dollars and had not advised him of the possibility of proceeding in forma pauperis. The Court held this claim cognizable under §2255, and further noted:

The appropriate relief, as indicated in Pate [v. Hoffman, 341 F.2d 764, (5th Cir. 1965)] would be to afford review of his judgment of conviction as adequate as if Lyles had appealed.

Pate v. Hoffman, supra, retrospectively applied the Supreme Court holding in Griffin v. Illinois, 351 U.S. 12 (1956), that refusal to provide a free transcript on appeal is a denial of due process. In Pate, counsel was appointed and an effective appeal allowed many years after the criminal conviction. Pate was followed in the Eighth Circuit in Swensen v. Donnel, 1 Cr. Law Rptr. 2269, (Aug. 3, 1967).

Other cases in which the frustration of an indigent's opportunity for direct appeal have resulted in relief whereby he was afforded review "as adequate as if he had appealed" are: Dodd v. United States, 321 F.2d 240 (9th Cir. 1963); Patterson v. Medberry, 290 F.2d 275 (10th Cir. 1961); Davis v. Wilson, 273 F. Supp. 852 (D.C. Cal., 1963). See also Doyle v. United States, pp. 22-23, supra; Juelich v. United States, 342 F.2d 29 (5th Cir. 1965); Dillon v. United States, 307 F.2d 445 (4th Cir. 1962).

II. ERROR WAS COMMITTED
IN THE COURSE OF
MOON'S TRIAL

(Trial Transcript 174, 183-189, 729 et. seq., 384

A. Statements Obtained In Violation of
Rule 40 (A) F. R. Cr. P. Were
Admitted Against Moon

Rule 40, Federal Rules of Criminal
Procedure, in effect at the time of Moon's arrest, provides
that a person arrested on a warrant issued in another
jurisdiction

"shall be taken without unnecessary
delay before the nearest available commissioner
or a nearby judge of the United States in the
District in which the arrest was made...."

Once there,

"the Commissioner or judge shall inform the
defendant of the charge against him, of his
right to retain counsel, and of his right to
have a hearing or to waive a hearing by signing
a waiver before the commissioner or judge.
The commissioner or judge shall also inform
the defendant that he is not required to make
a statement and that any statement made by
him may be used against him ...

Rule 40 was not complied with in this case. Moon
was not brought before a federal judicial officer and
not warned by anyone of his right to remain silent. It

also appears clear that Moon's waiver of a hearing was not signed before a federal judicial officer but in the Newark Jail the night before he was brought into the New Jersey court. (Hearing on May 1, 1959 Motion) (Tr. 52).

The failure to follow the procedures of Rule 10 is blatant here, the more so because this case arose 11 years after McNabb v. United States, 313 U.S. 332 (1943) and 6 years after Upshaw v. United States, 335 U.S. 410 (1943). In McNabb, the Supreme Court, acting under its supervisory power over the administration of criminal justice in Federal Courts, invalidated the admission of confessions obtained during a period of unnecessary delay in violation of Rule 5, Federal Rules of Criminal Procedure. Rule 10 is a foreign-arrest counterpart of Rule 5.

If McNabb left any doubt as to the procedures police must follow before questioning a suspect, Upshaw erased it. Significantly, Upshaw was a District of Columbia case. 33 U.S. App. D.C. 207, 163 F.2d 167

(1957). There police had questioned an unwarned suspect, but the testimony was that the confession was nevertheless voluntary. The Court in Upshaw stated: "In the McNabb case we held that the plain purpose of the requirement that prisoners should promptly be taken before committing magistrates was to check resort by officers to 'secret interrogation of persons accused of crime'." In the closing paragraph of Upshaw, the Court met the argument that questioning before presentment to a magistrate was part of "the usual procedure" by saying, "However usual this practice, it is in violation of law, and confessions thus obtained are inadmissible under the McNabb rule" 335 U.S. at 414. In light of Rule 40 and of the McNabb-Upshaw Rule, the admissions to the police officers and to the two women, all taken before the defendant was warned, were clearly inadmissible.

Moon's case is exactly like Willie Short's, in which this Court held inadmissible statements made after a North Carolina arrest and failure to comply with Rule 40. Jones and Short v. United States, 119 U.S.

App. D.C. 284, 342 F.2d 234 (1964).

The evils which brought about the McNabb-Upshaw rule are apparent in the scene which emerges from the policemen's testimony in this case. The unadvised defendant, in the exclusive company of police officers during the four hour ride back to Washington, tries to convince them not to charge. His training and background do not equip him to observe that the repeated statement that he did not get a fair share of the robbery proceeds is an admission of guilt. The atmosphere of the interrogation may be felt from the words of one officer, who testified:

"We started talking to him when he left the station [at Newark], when we left on the way to the station, when we got in the station we had something to eat there at the bar and were kidding around, playing with him and talking about the case, kept going back and forth about the case all the way in.

Q. I mean in the train?

A. In the train, yes, sir." (Tr. 174)

Upon arrival in Washington, the police took Moon, not to a magistrate, but to the scene of the robbery.

He was there exhibited to the robbery victim and another woman and repeated his admissions. This procedure was similar to that specifically outlawed in Naples v. United States, 113 U.S. App. D.C. 231, 307 F.2d 613 (1962).

Finally, the still unwarned, accused was booked at the robbery squad office, and apparently thinking to save himself, refused to sign a written statement. One officer testified that Moon had said on the train that

"he would not sign a statement that he had to fight this case; that he did not feel that actually that he did not get a full share so he should not be charged" (Tr. 139).

By the next morning when he was, at last, taken before a magistrate and presumably advised of his Fifth Amendment rights, the case against Thomas Moon was over.

B. Moon Was Convicted On The Basis of
His Uncorroborated Confession

Moon's total confession, as testified to by one of the officers who exacted it, was as follows:

He stated that on the morning of the robbery, Roosevelt Braddy, William Elmore Thomas, and Darnell Kinnard and another unknown subject named Jim rode past the 811 - 13th Street address several times, they watched it and that then the other four men put him out -- up on 14th Street and that later in the same morning they picked him up again and that this time Darnell Kinnard, Roosevelt Braddy and William Thomas were present and that the four of them rode down, on down 14th Street and after having ridden past the place 311 - 13th Street several times, they parked the car on the corner of I Street and 13th and that he stayed in the car, that is Roosevelt Braddy's -- [at this point the officer's testimony about the confession is interrupted by some colloquy among counsel and the court]

He told us that he stayed in the car Braddy's car, on I Street at 13th Street, that Roosevelt Braddy, Darnell Kinnard and William Thomas got out of the car.

Between them they had two guns. That they went down to this place and they later returned, gave him \$90 and put him out up on 14th Street (Tr. 133-39).

The government's theory was that Moon aided and abetted the robbery because he joined the co-defendants in "casing" the realty office, and was a "look-out" man during the robbery. (Tr. 729 et. seq). No evidence of this crime of aiding and abetting a robbery was

presented, other than Moon's own admissions.

There was no testimony from anybody who saw him in the car during the robbery; no connection between Moon and the car was shown; no evidence was presented that he had any of the proceeds of the crime (e.g. the checks which were stolen) on his person at any time. This is the sort of corroboration which clothes with credibility a naked admission of guilt. Corroboration was entirely absent here.

At the time Moon was tried the basic law on corroboration of a confession in the District of Columbia was Forte v. United States, 62 App. D.C. 111, 94 F.2d 236 (1937). In Forte, this Court held insufficient as corroboration of the crime of possession of a stolen car, the facts that when the defendant was arrested in the car the original tags were missing from it, other licence plates were lying on the front seat, and the defendant had tried to bribe the arresting officers.

Under the Supreme Court cases decided a month after Moon's conviction, his uncorroborated confessions

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were clearly insufficient. Copier v. United States,
343 U.S. 34 (1954). Smith v. United States, 343 U.S.
147 (1954).

C. Evidence of Moon's Participation
In The Robbery Was Insufficient

The total evidence connecting Moon with the robbery was the testimony of the officers and two women that he had said he drove past the real estate office with the other men, that he had been in the car around the block when the office was robbed, that he had known Kinnard and Thomas had guns, and that he had received a share of the proceeds.

Even had the testimony about Moon's statements been properly admitted into evidence, there would be a serious question as to the sufficiency of this evidence to convict of aiding and abetting a robbery. The car was parked too far away for Moon to have been a "look-out". The testimony was that yet another man was the "finger-man", i.e. the man who had picked out the realty office as a likely place to rob (Tr. 334).

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There was no testimony that Moon drove the getaway car, and there was evidence that at one point during the morning he had left the company of the others.

In Goodwin v. United States, 121 U.S. App. D.C. 9, 347 F.2d 793 (1965), one defendant was found shortly after a robbery in the getaway car with three other men who later proved to have robbed a store. Four men had been observed speeding away from the scene of the crime. Stolen goods were in the car. The Court of Appeals reversed this conviction as based upon insufficient evidence. The case against Moon was no stronger than that against Goodwin.

Similarly, the Second Circuit has held that: "Mere presence and guilty knowledge. . . would not suffice" to convict. There must be evidence that the defendant "was a participant rather than merely a knowing spectator". United States v. Garguilo, 310 F.2d 249, 254 (2nd Cir. 1962). In that case one Macchia had accompanied Garguilo on his visits to a print shop while Garguilo perfected his lability to duplicate United States currency.

Although Macchia doubtlessly knew that a crime was being committed, there was nothing to connect him with a common scheme or design to forward its commission. See also Johnson v. United States, 195 F.2d 673, (8th Cir. 1952); Morei v. United States, 127 F.2d 827 at 831 (6th Cir. 1942).

Appellant, at this point, asks simply that he be accorded what a non-indigent would have had in 1955: a decision as to whether there were errors at his trial which require reversal of his conviction.

CONCLUSION

For the foregoing reasons, appellant respectfully prays that the judgment of conviction against him be reversed, the sentence vacated, and that he be discharged from custody.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellant's
Brief was personally served on the United States
Attorney this 19 day of August, 1963.

Barbara Allen Bowman
Attorney for Appellant
(Court-appointed in the
District Court)